Petition

81-866

Office-Supreme Court, U.S.
FILED
OCT 9 1981
ALEXANDER L. STEVAS

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

MARCO ANTONIO ALVAREZ-ROMERO,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

When the United States District Court in Chicago ordered, and the Government conceded that approximately 180,000 visas had been withheld illegally from aliens of Petitioner's class, and the Court ordered that the status quo be maintained to correct the unlawful actions, is it a deprivation of due process not to recognize Petitioner's lawful alien status from the date (July 26, 1974) he would have been entitled to that status but for the Government's unlawful withholding of that status to him?

Since the rule in the Ninth Circuit applicable to Petitioner's case was changed (by direction of the United States Supreme Court) after proceedings before the administrative authorities, so that the petitioner's conviction of a minor narcotics offense would have been subject to waiver by the government had that rule been in effect at the time of his deportation hearing, is it an unfair violation of due

process not to remand the matter to the Attorney General for a determination of eligibility for a waiver of deportability under the standards now in effect?

LIST OF ALL PARTIES

The Petitioner is Marco Antonio Alvarez-Romero who is attempting to become a lawfully admitted permanent resident alien.

The Respondent is the Immigration and Naturalization Service.

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SUPREME COURT
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MARCO ANTONIO ALVAREZ-ROMERO,

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IMMIGRATION AND NATURALIZATION SERVICE,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

Robert L. Miller, Esq., on behalf of the Petitioner, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit entered in the above case on July 30, 1981.

OPINIONS BELOW

The initial decision of the immigration judge ordering petitioner deported from the United States to Mexico was made on January 3, 1977.

On December 31, 1977, the Board of Immigration Appeals remanded the case to the immigration judge consistant with the Immigration and Nationality Act amendments, Public Law 94-571, 90 Stat. 2703, and the Court's decision in Silva v. Levi, No. 76-C4268 (N.D. Ill.) March 22, 1977.

On February 10, 1978 the immigration judge certified his decision for review to the Board of Immigration Appeals on the same grounds as before.

On November 7, 1978 the Board of Immigration Appeals again reversed the immigration judge's order that petitioner did not come within Silva v. Levi, supra, without making a finding on any of the other merits of the appeal.

On February 15, 1979 the immigration judge again ordered the respondent deported from the United States to Mexico as being ineligible under Silva v. Levi, supra, due to his conviction on a crime involving a narcotic.

On June 18, 1980 the Board of Immigration Appeals affirmed the immigration judge's order of deportation.

On June 24, 1981 the United States Court of Appeals for the Ninth Circuit, in a memorandum opinion, affirmed the order for deportation on the principle ground that the petitioner was not protected by Silva v. Levi, supra, and no discretionary relief was available.

On July 30, 1981 the United States Court of Appeals for the Ninth Circuit denied petitioners petition for rehearing.

All pertinent opinions are contained in the Appendix.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was made and entered on July 30, 1981, and copies thereof are appended to this petition in the Appendix. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

Petitioner (hereinafter referred to as "Marco") was born in Mexico on March 1, 1951. On or about September of 1968, at the age of 17, Marco entered the United States with a border crossing card. At all material times since said entry, and to the present date, Marco has resided in California. In May of 1972, nearly 10 years ago, Marco married Bertha, a lawfully admitted permanent resident alien since May of 1967, and

their first child Elizabeth was born in December, 1972, at Los Angeles. Their second child, Marco Jr., was born also in Los Angeles in April of 1974. Marco's third United States citizen child was born subsequently.

On or about July 26, 1974, Bertha filed an application with the Immigration and Naturalization Service (hereinafter INS) at los Angeles, to accord Marco status as her spouse on the consular waiting list at the United States Consulate in Guadalajara, Mexico. Upon approval of the application by the INS, the consul accorded a priority date of July 26, 1974 to Marco. The seventh anniversary of this date occurred July 26, 1981. Since his original entry to the United States in September of 1968, he has been physically present in the United States except for brief departures the total of which do not exceed 22 days.

Prior to August of 1976, Marco had no criminal arrest or conviction. In August of 1976, Marco became involved with matters which

resulted in his narcotic conviction on October 7, 1976. Said conviction record, and specifically the sentence imposed on November 1, 1976, is evidence of the Court's sympathies for Marco. In recognition of his rather trifling involvement, the Court made its futile recommendation against deportation and imposed a short jail term to be served over weekends for the next few months following the date of conviction.

Marco respectfully urges that he has been caught in a legal trap not of his making. The only reason he was not a lawfully admitted permanent resident alien since at least July 26, 1974, is because the U.S. Government (as it has conceded) unlawfully withheld visas from Western Hemisphere natives, a practice which has been ordered corrected by the Federal Courts. (Silva v. Levi, supra.) To make matters worse, the INS has consistently refused to apply available relief to persons in Marco's position, following the conflicting position of the Ninth Circuit, until

February 17, 1981 when that Court came into line with the Second and other circuits following an order (without opinion) of this Court to that effect.

The background, therefore, is circular. The Government has denied relief to Marco because he has not been a lawfully admitted permanent resident alien for seven years and because the relief from his narcotics conviction has not been available in the Ninth Circuit. The reason that Marco was not a permanent resident, continuing with this circular argument, is because the Government has unlawfully withheld visas from persons in Marco's class, an action which the Government is presently under a Court order to correct. That is, Marco was deprived of a visa since July 26, 1974 by the same Government that refuses to recognize statutory relief from his conviction because he was not granted his visa.

The Court of Appeals for the Ninth Circuit avoided the issue in its opinion of June 24, 1981, by simply noting that seven years from Marco's

priority date of July 26, 1974 would not run until one month hence. The Court merely denied without comment the petition for rehearing on July 30, 1981. While the passage of time has itself cured the one peg upon which the Ninth Circuit avoided the issue, it neglected to address another conflict between the Second and Ninth Circuits in determining whether the seven-year qualifying lawful domicile starts from the date of admission for permanent residence or some earlier date such as the date of marriage to a lawful permanent resident and birth of a United States citizen child (both occurred in 1972 in the present case).

REASON FOR GRANTING THE WRIT

The United States Supreme Court has been largely silent on three enormously important issues, involving conflicts between at least two circuits, and affecting hundreds of thousands of

persons. The Court has, however, in orders without opinion, furthered the significant interests affected.

1. Until February 17, 1981 (long after the decisions of the INS and Board of Immigration Appeals herein, and after the matter had been fully briefed on review before the Court of Appeals), the Ninth Circuit steadfastly refused to grant discretionary relief to aliens (a) convicted of narcotics offenses, and (b) held in deportation rather than exclusion hearings. Both of these positions were in conflict with other circuits, mainly the Second. Petitioner was therefore precluded from ever applying for relief before the administrative authorities since the Ninth Circuit only came into line on February 12, 1981, following an order without opinion from this Court. (Tapia-Acuna v. INS, ___ U.S. ___, 101 S.Ct. 344, 66 L.Ed.2d 209.) While the conflict was thus resolved, in the absence of any direction from this Court there is no clear indication of the effect on persons such as

M co whose deportation hearings occurred prior to the orders of this Court and the subsequent acquiescence of the Ninth Circuit.

2. Similarly, the Ninth and Second Circuits have differed (to Petitioner's detriment) on the issue of the availability of discretionary relief to persons who have not been admitted for lawful permanent residence (a term of art), as opposed to being lawfully domiciled in the United States as commanded by the statute (8 U.S.C. §1182(c)) The position of the Ninth Circuit adheres to the administrative view that relief is only available to those in the former category, whereas the Second Circuit extends relief to those in the latter group. Taken in conjunction with the third point, this Court may resolve the conflict.

3. It has been held, and the Government concedes that large numbers (approximately 180,000) of visas were wrongly withheld from Western Hemisphere natives (including Petitioner) and distributed to Cuban refugees. Pursuant to

restraining orders issued by the United States District Court for the Northern District of Illinois (Silva v. Levi, supra), the Government was ordered to rectify its erros by withholding deportation of persons covered, granting employment authorizations to them, and by issuing the visas to said persons as fast as administratively possible. The purpose was to restore the status quo. Even ignoring the quality or lawfulness of Petitioner's domicile from 1972 or before, it is clear that he should have been a permanent resident alien from July 26, 1974, " but for" the Government's unlawful withholding of that status from him.[1/] By refusing to recognize the lawfulness of Petitioner's domicile, the status quo as ordered by the District Court has not been maintained and the differences between the Second and Ninth Circuits have not been

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1/ On July 29, 1981, Justice Stevens granted a stay of the restraining order in a case arising out of the Silva litigation, Contreras de Avila v. Civiletti (7th Cir., March 10, 1981) 643 F.2d 471, Nos. 80-1590, 80-1680, 80-1681.

resolved.

4. Pursuant to the Silva and the Francis cases, Petitioner was entitled to a hearing on his claim for adjustment of status and waiver of excludability, as well as a cessation of the deportation proceeding.

Upon the very first brief to the Respondent, petitioner asserted:

> "This case presents a complex interaction between two landmark cases of Francis v. I.N.S. (2d Cir. 1976) 532 F.2d 258, and Silva v. Levi, U.S. Dist. Ct., Northern District of Illinois, Eastern Division, No. 76 C 4268)."

The now famous case of Silva v. Levy, supra was filed on November 18, 1976. Shortly thereafter, the Central Office of the INS sent to the District offices a series of telegrams, telexes, and other formal and informal memoranda, ordering the suspension of action on Western Hemisphere natives with priority registration

dates before December 31, 1976. Some of these telegrams were dated January 18, January 31, March 11, March 24 and culminating in the Temporary Restraining Order dated April 1, 1977. Pursuant to paragraph 4 thereof, the INS may not begin, continue or conclude any expulsion proceeding unless there is a written specification by the Regional Commissioner or the District Director that the alien is clearly not eligible for relief on any grounds. Paragraph 5 prohibits the Board of Immigration Appeals from proceeding in a "Silva" case unless, from the record of proceedings, the Board can consider and determine the inapplicability of possible waivers of inadmissibility. Since the record is devoid of any opportunity to present a basis for such a claim, it was not possible for the Board to make such a determination.

In addition to a stay of expulsion of this specified group of Western Hemisphere aliens, the Silva case provided for a recapture of visa numbers designated non-preference after January

1, 1977. A spouse of a lawfully admitted permanent resident is entitled to a second preference visa under the new law, with the benefit of a previously-established priority date. Therefore, absent any binding determination of ineligibility, from the Silva case alone we may conclude that Marco may not have been expelled from the United States, and that he was and is eligible for adjustment of status as a second preference immigrant.

Pursuant to 8 U.S.C. §1182(c), a conviction of a crime involving a narcotic may be waived in the case of a person returning to an unrelinquished lawful domicile of seven years. Therefore, if applicable, this ground of ineligibility could be waived if the Government were willing to consider it.

This brings us to the next portion of the hypothesis, based upon an analysis of Francis v. I.N.S. (2d Cir. 1976) 532 F.2d 268. That decision was published in March of 1976, and only

acquiesced in by the Board of Immigration Appeals on September 10, 1976, (Matter of Silva, I.D. #2532). Allowing for the ordinary publication schedules of Board decisions, Matter of Silva was not made known to the practicing bar until approximately April of 1977. The case of Matter of Varagianis, I.D. #2537, decided a month later and published approximately at the same time, determined that the proper procedure in the face of a Francis issue is to reopen and remand for evidence on the issue of the applicability of 8 U.S.C. §1182(c) (Section 212(c) of the Immigration and Nationality Act). Both Francis, supra at page 271, and the aforesaid concurring opinion in Matter of Silva, supra at page 8, postulated the applicability of Section 212(c) relief when there is an application for adjustment of status under Sec. 245 of the Act, citing Matter of Smith (1965) 11 I. & N. 325. Faced with facts no less compelling than in the present case, and with the need to estimate the full scope of the Francis decision, on January

4, 1977, the Second Circuit remanded the matter to the Service for a full determination, (Lok v. I.N.S. (1977) 548 F.2d 3741).

Unfortunately, the Ninth Circuit was in complete conflict with the Second Circuit and even the administrative authorities, refusing to consider administrative relief for aliens held in deportation proceedings rather than exclusion hearings, and refusing to consider the statute applicable at all to narcotics offenses regardless of their severity. (Nicholas v. INS (9th Cir. 1979) 590 F.2d 802).

On February 17, 1981, long after the administrative proceedings below, and after the matter was fully briefed, the Ninth Circuit followed the direction of the Supreme Court and fell into line with the Second Circuit in Tapia-Acuna v. INS (9th Cir. 1981) supra. The Ninth Circuit is thus in harmony with the remainder of the country to the extent that discretionary relief under 8 U.S.C. §1182(c) is available in deportation hearings, and

for convictions involving narcotics.

Although the Tapia-Acuna case was available at the time of argument, the Ninth Circuit issued its opinion on June 24, 1981, failing to consider the issue at all but merely noting that Marco's seventh year (from his priority date) ran four-weeks hence, so that the discretionary relief of the statute was not available at all. Although the seventh year (from his priority date) had run by the time of the petition for rehearing, that petition was denied without comment.

Petitioner contends that the seventh year has run in the interim, and further contends that he has never had an opportunity to present any claim of lawfulness of his domicile as required by the statute.

Recalling Chief Judge Kaufman's reference to the labrinthian and Draconian nature of the immigration laws with which we are dealing, (Lok v. I.N.S., (2d Cir. 1977) 548 F.2d 37, 38), and given the equities and facts asserted hereinabove,

it would have been both appropriate and proper to remand the matter to the administrative authorities for a full presentation of the facts and law for a full hearing and determination. The absence of an adequate record upon which to predicate a decision on virtually identical issues recently compelled the Court to remand the matter in Vissian v. I.N.S. (10th Cir. 1977) 548 F.2d 325. In so doing, the Vissian Court noted the "silent record" (fn. 4, page 329), and stated,

> "...the more fundamental and controlling inquiry in the case at bar, i.e., whether the factual basis for the exercise of discretion was established in a full and fair hearing comporting with accepted principles of due process ....The necessary concomitant of the immigration judge's misconception of the availability of Section 212(c) relief was that Vissian was precluded from presenting evidence in support of a

favorable exercise of discretion, e.g., evidence of mitigating circumstances, subsequent reformation, hardship, or value to the community. The gratuitous statement of the immigration judge that he would deny the application in any event was therefore based on evidence relating solely to the issue of deportability, rather than to the separate and distinct issue of whether deportation should be waived in this particular case. (Vissian, supra at 329-330).

The substance of the argument is that neither the administrative authorities nor the Ninth Circuit considered the applicability of the discretionary relief provided for by the statute (8 U.S.C. §1182(c); Sec. 212(c) of the Act).

The argument presented is to the effect that due to the Silva litigation, the petitioner did not have his lawful permanent residence only because the government unlawfully deprived him of it. The Ninth Circuit picked the July 26, 1974 priority date as the point from which the seven years should be

should be counted under 8 U.S.C. §1182(c), which would place the seventh year as of July 25, 1981, within a couple of weeks of the petition for rehearing. However, 8 U.S.C. §1182(c) speaks in terms of "lawful domicile" rather than permanent residence. Despite any reference to the priority date, the record reflects that the petitioner entered the United States in 1968 with a border crossing card, married his present lawful permanent resident spouse in 1972, and fathered three U.S. citizen children, the first born in 1972. The administrative position that the seven years commences upon admission for permanent residence has been upheld in the Ninth Circuit, Castillo-Felix v. INS (9th Cir. 1979) 601 F.2d 459, which is in conflict with the Second Circuit in Tim Lok v. INS (2d Cir. 1977) 548 F.2d 37, neither of which mention Elkins v. Moreno (1978) 435 U.S. 647, all relating to the question of lawfulness of domicile as compared to the status of lawful admission for permanent residence. This

is an unsettled question and no effort has been made in this proceeding, at any level administrative or otherwise, to determine the concept of the lawfulness of the domicile of the petitioner herein. In fact, the position of the administrative authorities from the very first hearing has been that 8 U. S. C. §1182(c) relief is totally inapplicable to narcotics convictions in the Ninth Circuit, so that any other issue was never reached or determined. Indeed, it was not until the February 17, 1981 decision of Tapia-Acuna v. INS, supra, by that Court vindicating the position of the petitioner. Since no opportunity was ever extended to reach any of the subsidiary issues, no finding was made as to whether there was any lawfulness of domicile under 8 U. S. C. §1182(c).

The Government's position has rested solely on the premise that petitioner is not entitled to adjustment of status because of his prior conviction and therefore all other grounds and arguments raised by the petitioner should not apply.

The Government contends that since the petitioner is not a permanent resident, he will not be eligible for any kind of relief.

The Government fails to recognize that had it not been for the Government's misappropriation of Visa numbers to Cuban refugees instead of allocating them to those who were entilted to it, this petitioner would have been a permanent resident long before his criminal conviction occurred, and the Silva case (supra) was precisely intended to correct this inequity.

The Government's analysis puts the petitioner in a no-win situation, with the circular argument that had the petitioner been a permanent resident, he may have been entitled to some sort of relief, however there is no relief available to him because he is not a permanent resident which the Government

illegally denied all Silva class persons. On the other hand, he will not be afforded Silva protection because he has had the drug conviction after the time he was otherwise eligible for the visa.

The above reasoning clearly indicates that Government's argument has no merit, because the reason why this petitioner is not yet adjusted to that of a permanent resident is the fact that visa numbers allocated to these individuals were wrongfully taken away from them and given to the Cuban refugees. Therefore, the Government is trying to penalize the petitioner because of a wrong done to him by the Government in the first instance.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted

ROBERT L. MILLER

Attorney for Petitioner

APPENDIX

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES IMMIGRATION COURT

Los Angeles, California

File No. A21 529 631 February 10, 1978

In the Matter of	)	
	)	In Deportation
Marco A. Alvarez-Romero,	)	Proceedings
	)	
Respondent.	)	

CHARGE: I & N Act, Section 241(a)(11); conviction for narcotic offense.

APPLICATION: None.

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Robert L. Miller, Esq.	Jane Gersbacher, Esq.
1930 Wilshire Boulevard	Trial Attorney
Los Angeles, California	Los Angeles, California

ORAL DECISION OF THE IMMIGRATION JUDGE

These proceedings were remanded by the Board of Immigration Appeals on December 31, 1977, to consider the matter in light of the Temporary Restraining Order in Silva v. Levi, No. 76-C4268 (N.D. Ill) March 22, 1977, and to consider any

other relief that may be available to the respondent at this time.

Respondent claims that he is within the purview of the aforementioned Temporary Restraining Order as he has a priority date for the issueance of an immigrant visa with the Mexican Consulate at Guadalajara as of July 26, 1974. His eligibility is based upon his being the spouse of a permanent resident of the United States and the father of two United States citizen children.

The Trial Attorney has stated that the respondent is ineligible for an immigrant visa because of his conviction for the narcotic offense which forms the basis for the issuance of the Order to Show Cause. Respondent was convicted for the offense of possession and distribution of a controlled substance (heroin), in violation of 21 U.S.C. 841(a)(1). Judge Grady stated, "The purpose of this Temporary Restraining Order is to maintain the status quo as to those members of the class earlier

certified by this Court who are not clearly ineligible for immigrant visa," Silva v. Levi, supra.

As the respondent would be ineligible to be issued an immigrant visa under 212(a)(23) of the Act by reason of his conviction for possession and distribution of heroin, he does not come within the Temporary Restraining Order. I find that Silva v. Levi, supra, does not apply.

There would be no basis for consideration of relief under Section 212(c) of the Act since the respondent has never been admitted to the United States for permanent residence. He would be ineligible to adjust his status in this country under Section 245 of the Act as his last entry was achieved on the basis of his false claim to United States citizenship.

In accordance with the Order of the Board, I shall, therefore, certify my decision for review.

ORDER that the matter be certified to the Board of Immigration Appeals for review of my opinion.

/s/_____
Jay Segal
Immigration Judge

A21 529 631

UNITED STATES DEPARTMENT
OF JUSTICE

SEAL Board of Immigration Appeals

Washington, D. C. 20530

Nov 07 1978

File: A21 539 631 - Los Angeles

In re: MARCO ANTIONO ALVAREZ-ROMERO

IN DEPORTATION PROCEEDINGS

ON BEHALF OF RESPONDENT: Robert L. Miller, Esq.
Miller & Miller
Suite 809
1930 Wilshire Blvd.
Los Angeles, CA 90057

ON BEHALF OF I&N SERVICE: Jane Gersbacher
Trial Attorney

CHARGE:

Order: Sec. 241(a)(11), I&N Act (8 U. S. C. 1251(a)(11) - Nonimmigrant - convicted of possession and distribution of a narcotic drug, to wit heroin

APPLICATION: Termination of proceedings

The immigration judge has certified to us for review his decision dated February 10, 1978, pursuant to our order of December 13, 1977

remanding the record for further proceedings. In his earlier decision dated January 3, 1977, the immigration judge found the respondent deportable u under section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(11) and ordered his deportation to Mexico (Form I-38).

Our order remanding the record was motivated in part by the Court's order in Silva v. Levi, No. 76-C4268 (N.D. Ill. March 22, 1977), as has been subsequently amended, and the passage of the Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703.

On remand, the immigration judge found that the respondent is registered with an American Consul in Guadalajara with a priority date of July 26, 1974. However, he further found that the respondent does not come under the Temporary Restraining Order on the basis that he is ineligible for an immigrant visa under section 212(a)(23) of the Act, 8 U.S.C. 1182 (a)(23), inasmuch as he was convicted of a heroin violation under 21 U.S.C.

841(a)(1). Additionally, the immigration judge found: (1) that the respondent is ineligible for relief under section 212(c) of the Act, 8 U.S.C. 1182(c), inasmuch as he was not a lawful permanent resident; and (2) and that he is ineligible for for relief under section 245 of the Act, 8 U.S.C. 1255, inasmuch as he last entered the United States without having been inspected and admitted as required under that section for statutory eligibility.

The respondent, a 27-year-old native and citizen of Mexico, at the hearing on January 3, 1977, admitted entering the United States on January 11, 1976. He has a spouse who is a lawful permanent resident and two United States citizen children.

On appeal in his supplemental brief dated September 18, 1978, the respondent (with new counsel) has submitted a copy of Criminal Minutes, United States District Court, Central District of California, Case No. 76-1072, dated March 13,

1978, deleting the words "possession and" from the judgment previously entered on November 1, 1976 upon his plea of guilty to possession and distribution of a controlled substance in violation of 21 U.S.C. §841(a)(i), and sentenced to one year confinement, 60 days to be served on successive weekends with the remainder suspended and placed on probation for three years. The Court recommended against the institution of deportation proceedings. Consequently, the respondent asks that the record be remanded so that the immigration judge may consider this new evidence.

Inasmuch as the respondent is a native of Mexico and has a priority date of July 26, 1974, he is under the protection of Silva v. Levi, supra.

That Temporary Restraining Order states inter alia, that the Immigration and Naturalization Service shall not begin, continue or conclude any effort to expel an alien known to have a priority date for the issuance of an immigrant visa between July 1, 1968, and December 31, 1976 except if the

provisions of paragraph 4 of the order are met. The only subdivision of paragraph 4 relevant to this case is (c).

Paragraph 4(c) provides:

> 4. The INS may begin, continue or conclude any effort to expel an alien otherwise protected by his order, . . . if:
>
> (a) . . .
>
> (b) . . .
>
> (c) the District Director, Acting District Director, or Deputy District Director, personally concludes, after due consideration of possible waivers of grounds of excludability, that the alien is clearly not eligible for an immigrant visa on any grounds other than those specified in subparagraphs (a) and (b) above, in which case

that official shall set forth in writing all his reasons for reaching that conclusion.

The temporary Restraining Order in Silva v. Levi, supra, did not give the immigration judge authority parallel with the District Director under section 4(c) of the order to determine that the deportation proceeding should go forward on the basis of clear ineligibility for a visa. Consequently, the immigration judge, in finding the order in Silva v. Levi, supra, inapplicable to these proceedings, is in error. Accordingly, we will remand the record to the immigration judge.

Upon remand, the immigration judge will fully comply with the requirements of the Temporary Restraining Order of Silva v. Levi, supra. Any finding of ineligibility of the respondent for a visa, under section 212(a)(23) of the Act, must first be made in writing by the District Director before the deportation proceedings can

be continued.

We again make no finding on the merits of the appeal at this time. Should the respondent be found to be ineligible for relief, or should a decision on an application for relief be adverse, an appropriate order shall be entered and the record shall again be certified to this Board for review.

ORDER: The decision of the immigration judge for further proceedings consistent with the foregoing opinion.

/s/ (David L. Milhollan)

Chairman

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES IMMIGRATION SERVICE

Los Angeles, California

In the Matter of	File: A21 539 631
MARCO ANTONION ALVAREZ-ROMERO	Date: February 15, 1979
Respondent	DEPORTATION PROCEEDINGS

CHARGE: I & N Section 241(a)(1) Nonimmigrant conviced for possession and distribution of narcotic drug, to wit, heroin

IN BEHALF OF RESPONDENT:	IN BEHALF OF SERVICE:
Robert L. Miller, Esq. 1930 Wilshire Boulevard Suite 809 Los Angeles, California 90057	Thomas Y. K. Fong, Esq. Trial Attorney Los Angeles, California

ORAL DECISION OF THE IMMIGRATION JUDGE

These proceedings were remanded to me by the Board of Immigration Appeals on November 7, 1978. Finding that I incorrectly assumed the authority of the District Director in finding the

respondent would be ineligible to be issued an immigrant visa under Section 212(a)(23) by reason of his conviction for possession and distribution of heroin. Pursuant to the order of the Board I requested and received into evidence a copy of a letter prepared by the Acting District Director at Los Angeles dated January 29, 1979, Exhibit No. I-R. He states as follows:

> "Although you have a priority date of July 26, 1974 with the American Consul in Mexico to receive an immigrant visa, you are ineligible to receive such visa under Section 212(a)(23) of the Immigration and Nationality Act because you were convicted of a heroin offense under 21 U.S.C. 841(a)(1). There are no waivers available to you under the Immigration and Nationality Act for this offense."

The Acting District Director further determined that these proceedings were to continue. His letter fully complies with the permanent restraining order in Levi v. Silva, No. 76-C4268 (U.S. D.C. N.D. Ill 10-10-78.

On the basis of the respondent's admissions and the evidence submitted in support of factual allegations No. 4, that the respondent was on October 7, 1976 convicted in the United States Court for Central District of California for the offense of knowingly and intentionally distributing heroin in violation of Title 21 United States Code, Section 841(a)(1). I am satisfied that he is deportable on the charge set out in the Order to Show Cause, and that his deportation has been established by clear, convincing and unequivocable evidence.

ORDER: IT IS ORDERED that respondent be deported from the United States to Mexico on the charge on the Order to Show Cause.

IT IS FURTHER ORDERED that this matter be certified to the Board of Immigration Appeals pursuant to their order of November 7, 1978.

/s/_____
Jay Segal
IMMIGRATION JUDGE

A21 539 631

UNITED STATES DEPARTMENT OF JUSTICE

SEAL

Board of Immigration Appeals

Washington, D.C. 20530

File: A21 539 631 - Los Angeles Jun 18 1980

In re: MARCO ANTONIO ALVAREZ-ROMERO

IN DEPORTATION PROCEEDINGS

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF I&N SERVICE: Jane Gersbacher
Trial Attorney

CHARGE:

Order: Section 24(a)(11), I&N Act (8 U.S.C. 1251(a)(11)) - Nonimmigrant - convicted of possession and distribution of a narcotic drug, to wit heroin

APPLICATION: Termination of proceedings

The immigration judge has certified to us for review his decision dated February 15, 1979, pursuant of our order of November 7, 1978, remanding the record for further proceedings. In his earlier decision dated January 3, 1977, as in his certified decision, the immigration judge found the respondent deportable under section 241(a)(11) of the

Immigration and Nationality Act, 8 U.S.C. 125(a)(11), and ordered his deportation to Mexico (Form I-38). The decision will be affirmed.

Our order remanding the record was motivated in part by the Court's order in Silva v. Bell, No. 76-C4268 (N.D. Ill. March 2, 1977), as has been subsequently amended, and the passage of the Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703. On remand the Acting District Director found that the respondent is registered with an American Consul in Guadalajara with a priority date of July 26, 1974. However, he further found that the respondent does not come under the Temporary Restraining Order on the basis that he is ineligible for an immigration visa under section 212(a)(23) of the Act, 8 U.S.C. 1182(a)(23), inasmuch as he was convicted of a heroin violation under 21 U.S.C. 841(a)(1). Therefore, the Acting District Director having complied with paragraph 4(c) of the Temporary Restraining Order in Silva v. Bell, supra,

determined that the deportation proceedings should go forward. (Ex. 1R). Thereupon, the immigration judge again found the respondent deportable under section 241(a)(11).

Our view of the record shows that the 28-year-old respondent, a native and citizen of Mexico, who has a lawful permanent resident spouse and two United States citizen children, entered the United States on January 11, 1976, without having been inspected by an officer of the Service. (Tr. p. 12). Subsequently, on November 1, 1976, in the United States District Court for the Central District of California, No. CR 76-1072, the respondent, on his plea of guilty to possession and distribution of a controlled substance in violation of 21 U.S.C. 841(a)(1), was convicted and sentenced to one year confinement, 60 days to be served on successive weekends with the remainder suspended and placed on probation for three years. In his supplemental brief dated September 18, 1978, the respondent has submitted a copy of Criminal

Minutes from the Court dated March 13, 1978, deleting the words "possession and" from the judgment previously entered on November 1, 1976. The court recommended against the institution of deportation proceedings. (Ex. 3.) Moreover, the respondent with previous counsel admitted the allegations of fact contained in the Order to Show Cause. In view of his admissions and conviction record, we find that the respondent's deportability was established by evidence which is clear, convincing and unequivocal. 8 C.F.R. 242.14.

Nevertheless, the respondent contends that he has not been convicted of a crime which renders him deportable under section 241(a)(11) of the Act. We find that the contention is not substantiated by the record. By the corrected judgment, respondent stands convicted of unlawfully distributing heroin in violation of 21 U.S.C. 841(a)(1), but not of possession. This is still a violation of section 241(a)(11) of the Act, which condemns conviction under any law governing the "giving away" of that

sentence. Although the Court at time of sentencing recommended against deportation, the statute directs that section 241(b) of the Act shall not apply to relieve from deportability an alien whose conviction results in a charge under subsection (a)(11) of section 241. The resulting conviction establishes respondent's deportability under section 241(a)(11) of the Act. United States v. Gonzalez, 582 F.2d 1162 (7 Cir. 1978). Therefore, we agree with the decision of the immigration judge.

On appeal, the respondent assails the finding of the immigration judge: (1) that the respondent is ineligible for relief under section 212(c) of the Act and (2) that he is ineligible for relief under section 245 of the Act, 8 U.S.C. 1255. We find that the respondent is ineligible for relief under section 212(c) of the Act, inasmuch as he was not a lawful permanent resident. Moreover, the Ninth Circuit has held that relief under section 212(c) is not available to an alien found deportable for conviction of a drug related crime pursuant to 8 U.S.C.

1251(a)(11). Nicholas v. INS, 590 F.2d 802 (9th Cir. 1979); Dunn v. INS, 499 F.2d 856 (9 Cir. 1974); cert. denied, 419 U.S. 1106 (1975). Relating to the discretionary relief of adjustment of status under section 245 of the Act, this relief is available to an alien who, inter alia, was inspected and admitted to the United States, if the alien is eligible to receive an immigrant visa and is admissible to the United States. The respondent evaded inspection as an alien upon his last entry by claiming to be a citizen of the United States (Tr. p. 12, 13). Therefore, the respondent is not eligible for adjustment of status.

Moreover, the respondent is not eligible for voluntary departure under section 244(e) of the Act nor for suspension of deportation under section 244(a) of the Act. Inasmuch as his 1976 conviction relating to traffic in narcotic drugs establishes his inadmissibility under section 212(a)(23), he is barred under section 101(f)(3) from asserting his good moral character to establish eligibility for

that relief. Nor, relating to suspension of deportation, would the respondent satisfy the 10-year-physical presence requirement for suspension of deportation, inasmuch, as he had last entered the United States on January 11, 1976, although he had entered previous to 1969, and departed under grants of voluntary departure. Matter of Barragan, 13 I&N Dec. 759 (BIA 1971); aff'd Barragan-Sanchez v. Rosenberg, 471 F.2d 758 (9 Cir. 1972).

The respondent further avers on appeal that the Acting District Director's letter dated January 19, 1979 (Ex. 1R), was admitted without proper authentication; therefore, the letter would be inadmissible. We disagree. The introduction of the copy was not objected to at the hearing; its admissibility cannot now be objected to on appeal. Likewise we reject counsel's contention that the transcript is inaccurate. Our reading of the record satisfies us that it reads in a logical sense.

Inasmuch as the respondent is a native of Mexico and has a priority of July 26, 1974, he

would be under the protection of Imelda Contreras de Avila v. Bell, No. 78-C1166, (N.D. Ill. December 21, 1979). That restraining order states, inter alia, that any native of Mexico known by the Service to have a second preference priority date earlier than April 1, 1978, or a preference priority date earlier than July 1, 1976, shall be permitted by the Service to remain in the United States and the Service shall not begin, continue or conclude any effort to expel such an alien, except if the provisions of paragraph 2 are met. The only subdivision of paragraph 2 relevant to the case is (b). Paragraph 2(b) provides:

> 2. The INS may begin, continue or conclude any effort to expen an alien otherwise protected by this order, . . . if:
>
> . . .
>
> b) The alien is a Mexican second preference visa applicant and the INS affirmatively determines by contact with

> the consular or INS office through which the alien is applying tht the alien has not become documentarily qualified for the issuance of a visa. . . .

However, the acting District Director previously determined that the respondent is ineligible to receive an immigrant visa since he is inadmissible under section 212(a)(23) of the Act. Therefore, after due consideration of possible waivers of inadmissibility and of permission to reapply for admission pursuant to sections 212(a)(16) and (17) of the Act, 8 U.S.C. 1182(a)(16 and (17), we find that the respondent is not protected by the restraining order in Imelda Contreras de Avila v. Bell, supra.

On the basis of the record and the respondent's briefs on appeal we are satisfied that the standards of due process have been met and that the respondent was accorded a fair hearing. The decision of the immigration judge is correct. Therefore, the appeal will be dismissed.

ORDER: The decision is affirmed.

/s/ (David L. Millhollan)

Chairman

FILED
JUN 24 1981
RICHARD H. DEANE
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARCO ANTONIO ALVAREZ-ROMERO Petitioner, vs. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. CA 80-7380 MEMORANDUM

Petition for Review of the Order of the Board of Immigration Appeals
Argued and Submitted June 4, 1981

Before: ALARCON and BOOCHEVER, Circuit Judges and SOLOMON,* District Judge

Marco Antonio Alvarez-Romero (Petitioner), a native and citizen of Mexico, appeals from an order of deportation based on his conviction for distribution of heroin. We affirm.

*The Honorable Gus J. Solomon, Senior Judge for the District of Oregon, sitting by designation.

Petitioner first entered the United States in September, 1968, with a border crossing card. In May, 1972, he married a lawful permanent resident alien. They have two United States citizen children born in Los Angeles in 1972 and 1974. As the spouse of a lawful permanent resident, petitioner was given a visa priority date of July 26, 1974, at the United States Consulate in Guadalajara.

In November, 1976, petitioner pleaded guilty to one count of distribution of heroin, 21 U.S.C. §841(a)(1). He was given a one year sentence (60 days to be served on successive weekends and the balance suspended) and three years probation. The district judge recommended against the institution of deportation proceedings.

On November 18, 1976, an Order to Show Cause was issued against petitioner by the Immigration and Naturalization Service (INS) alleging that he was not a United States citizen or national; that he had been convicted of distribution of heroin in

violation of 21 U.S.C. §841(a)(1). It charged that he was subject to deportation under section 241(a)(11) of the Immigration and Nationality Act (Act), 8 U.S.C. §1251(a)(11).[1]

A hearing was held on January 3, 1977. Petitioner was represented by counsel, who said that he was unfamiliar with the proceedings. Counsel waived the reading of the Order to Show Cause, stipulated to petitioner's criminal record consisting of the indictment, judgment and sentence for the knowing and intentional distribution of a narcotic drug in violation of 21 U.S.C. §841(a)(1), and admitted the facts. He also admitted that petitioner did not receive an immigrant visa and was not admitted to the United States for permanent residence. Counsel asked about suspension of deportation and the Immigration Judge (IJ) told him that petitioner was not entitled to it. The IJ ruled that petitioner was deportable on the charge in the Order to Show Cause.

Petitioner, with different counsel, appealed to the Board of Immigration Appeals (BIA); he raised many issues. The BIA remanded, because petitioner was a native of the Western Hemisphere and may have acquired rights by both the Immigration and Nationality Act Amendments of 1976. Public Law 94-571, 90 Stat. 2703,[2] and by the Court's decision in Silva v. Levi,[3] No. 76-C4268 (N.E. Ill.) March 22, 1977.

A second hearing was held on February 10, 1978. Petitioner submitted evidence showing the basis on which he received his visa priority date and answered questions propounded by the IJ. The IJ again found petitioner deportable. He ruled that petitioner was not eligible for Silva relief because of the narcotics conviction. He found that the petitioner had last entered the United States illegally, a fact which had been stipulated to at the hearing held on January 3, 1977 and was not challenged at subsequent hearings. The IJ therefore ruled that petitioner was ineligible for

relief under sections 245 or 212(c) of the Act [8 U.S.C. §1255 and §1182(c)].[4]

Petitioner again appealed. The BIA remanded to the District Director on the ground that Silva requires that an alien covered by the Silva restraining order can be expelled only if the District Director determines that the alien is not eligible for adjustment of status.

The District Director determined that petitioner was not eligible for an immigration visa because of petitioner's narcotic conviction. He also stated that there were no waivers of deportation available to petitioner for this offense.

At the third hearing, held on February 14, 1979, a photocopy of the District Director's letter was admitted in evidence. The IJ again ordered deportation.

The BIA affirmed the order of deportation. It concluded that petitioner's heroin conviction made him deportable under section 241(a)(11) and that the district judge's recommendation against

deportation was inapplicable because of section 241(b).[5] The BIA also concluded that petitioner was not eligible for discretionary relief and that petitioner's contentions concerning the fairness of his hearings have no merit.

In his appeal to this court, petitioner raises many issues. We affirm the decision of the BIA ordering deportation.

Petitioner does not contest the facts of his conviction. But he asserts that deportation is authorized when ordered by the Attorney General only if the alien "has been convicted of the violation of any laws or regulations relating to the illicit possession of or traffic in ncarcotic drugs or any law or regulation governing or controlling . . . transportation . . . exhcange . . . dispensing . . . (or) fiving away of heroin." 18 U.S.C. §1251(a)(11). Petitioner contends that distribution, the crime for which he was convicted is not included among the acts in that subsection. This contention is frivolous.

Petitioner also contends that the district judge's recommendation against deportation should have been followed. This contention has no merit. A judge's recommendation that an alien not be deported does not apply if the alien is deported under subsection (a)(11) of section 241.

Petitioner next contends that he was denied adequate representation of counsel at his first hearing and that all of his hearings were procedurally improper. He lists many specifications of error.

At all hearings subsequent to the first one, petitioner had ample opportunity to present evidence, and he was represented by competent and aggressive counsel. We have considered each of petitioner's specifications of error; the administrative record, including the transcripts, shows that the petitioner was not prejudiced by any of the alleged deficiencies and errors.

Finally, petitioner contends that he was improperly denied the opportunity to petition for

discretionary relief.

Petitioner's heroin conviction makes him ineligible for relief under sections 244(a) and 244(e), because he is unable to show the requisite good moral character. The conviction also makes him ineligible for relief under section 245, because he is ineligible for a visa under 8 U.S.C. §1182(a). Petitioner is not a lawfully admitted permanent resident, but he contends that because he is a member of the Silva class, relief under section 212(c) should be available to him. We do not believe that the restraining order in Silva provides this relief, but we need not reach this issue because petitioner has not satisfied the seven year residency requirement of section 212(c). Petitioner's visa priority date, the earliest date from which to calculate the residence requirement, is less than seven years.

The order of deportation is affirmed. The mandate shall issue now.

FOOTNOTES

1
8 U.S.C. §1251(a)(11) makes deportable any alien who is convicted of violating any law governing the sale, exchange, dispensing, or giving away of heroin.

2
Under prior law, a native of a Western Hemisphere country would be eligible for permanent residence as the parent or spouse of a United States citizen or lawful permanent resident. This Amendment abolished this method of eligibility, but contained a saving clause, which provided that anyone who has established eligibility under the old Western Hemisphere quota, and had properly registered for an immigrant visa with a United States Consul on or before December 31, 1976, would be eligible for permanent residence without the need to obtain labor certification.

3
Silva v. Levi was brought as a consequence of the Cuban Adjustment Act of 1966, which gave Cuban refugees resident status in the United States. The visa numbers assigned to the Cuban refugees were charged against the Western Hemisphere immigration quota, which made those visa numbers unavailable to applicants from other Western Hemisphere countries. The INS subsequently agreed that it was wrong to charge the Cuban visas against the Western Hemisphere quota. But many persons, especially Mexicans, had, in the Cuban charging period, entered the United States illegally and were deportable for entering without inspection. In the class action, plaintiffs contended that had the usual quota been in effect, they would not have needed to enter the United States illegally and would, therefore, not be deportable for entering without inspection. The District Court granted an injunction restraining

the INS from deporting Western Hemisphere aliens who had entered the United States before March 11, 1977, and had obtained a visa priority date before January 1, 1977.

4

8 U.S.C. §1255 gives the Attorney General discretion to adjust the status of an alien who was inspected and admitted to the United States to that of a lawfully admitted permanent resident if that alien is eligible to receive an immigration visa.

8 U.S.C. §1182(c) provides that aliens lawfully admitted for permanent residence, who temporarily proceed abroad voluntarily, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to subparagraph 23 of §1182(a), which makes excludable at entry any alien convicted of a violation of any law governing the distribution of heroin.

5

8 U.S.C. §1251(b) [Section 241(b) of the Act] provides that an alien subject to deportation for conviction of a crime will not be deported if the court sentencing the alien recommends that the alien not be deported. However, it specifically excludes from the subsection any alien charged with being deportable under subsection (a)(11).

UNITED STATES CODE

Title 8, Section 1182(c)

Nonapplicability of subsection (a)(1) to (25), (30), and (31)

(c) Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title.

Title 28, Section 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judment or decree;

IMMIGRATION AND NATURALIZATION ACT -- Section 245

(a) The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

(b) Upon the approval of an application for adjustment made under subsection (a), the Attorney General shall record the alien's lawful admission

for permanent residence as of the date the order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the number of the preference or nonpreference visas authorized to be issued under sections 202(e) or 203(a) within the class to which the alien is chargeable for the fiscal year then current.

(c) The provisions of this section shall not be applicable to (1) an alien crewman; (2) an alien (other than an immediate relative as defined in section 201(b)) who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status; or (3) any alien admitted in transit without visa under section 212(d)(4)(C).